

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

UNITED STATES OF AMERICA

v.

GREGG SMITH and
MICHAEL NOWAK,

Defendants.

Case No. 19-cr-00669

Hon. Edmond E. Chang

**DEFENDANTS' JOINT MOTION TO BAR THE GOVERNMENT FROM
BELATEDLY REVISING ITS VERSIONS OF THE OFFENSE CONDUCT**

Gregg Smith and Michael Nowak jointly move the Court for an order barring the government from its belated and unfair attempt to revise its versions of the offense conduct through a lengthy and novel expert declaration that it submitted to the Probation Office yesterday afternoon. The government should not be permitted to violate the Court-ordered deadline and expand its versions of the offense conduct now, three months late, with the presentence reports and sentencing memoranda due in a matter of weeks. In support of this motion, we state the following:

1. On August 16, 2022, the Court scheduled sentencing for Messrs. Smith and Nowak for February 22 and 24, 2023, respectively. The Court set deadlines of August 30, 2022, for the government's versions of the offense conduct, and September 7, 2022, for Defendants' respective versions. *See* ECF No. 679–80.

2. On August 23, 2022, Messrs. Smith and Nowak filed a joint, unopposed motion to extend the submission schedule for versions of the offense conduct, so that the government's versions would be due on September 21, 2022, and Defendants' respective versions on October

12, 2022, “[t]o ensure sufficient time for the parties to prepare their versions of the offense conduct, given the complexity of this case.” ECF No. 682. The Court granted the unopposed motion on August 29, 2022. ECF No. 683.

3. Four days later, on September 2, 2022, in granting a separate unopposed motion by Defendants to extend the briefing schedule for post-trial motions, the Court warned the parties that “no further extensions will be granted absent the most extraordinary circumstances.” ECF No. 686.

4. The government submitted its versions of the offense conduct to the Probation Office on September 21, 2022. In its versions, the government included conclusory claims regarding purported loss amounts and numbers of victims, which it said would be supported by a “forthcoming declaration of Professor Venkataraman.” Gov’t Version (Smith) at *8; Gov’t Version (Nowak) at *7.

5. No such declaration came, and Messrs. Smith and Nowak submitted their respective versions of the offense conduct to the Probation Office on October 12, 2022.

6. Yesterday afternoon—on December 22, 2022, three months after the September 21, 2022 deadline, and without seeking the Court’s leave or Defendants’ consent—the government submitted to the Probation Office a declaration of Prof. Venkataraman, more than twice the length of each of its versions, and containing broad, unclear, and novel analyses of a vast universe of purported spoofing sequences, which Defendants would need to parse and reproduce to be in a position to address. The government provided no explanation why it failed to meet the Court’s September 21, 2022 deadline.

7. Under Local Crim. R. 32.1(f), the presentence reports as to Messrs. Smith and Nowak are due by January 18 and 20, 2023, respectively (i.e., 35 days before sentencing). The

Court's August 16, 2022 minute entries require that any sentencing memoranda be filed by February 3, 2023 (Smith), and February 7, 2023 (Nowak), respectively. *See* ECF Nos. 679–80.

8. The government's attempt to circumvent the Court-ordered deadlines by revising its versions of the offense conduct now—amidst the end-of-year holidays and with mere weeks to go before the presentence reports and sentencing memoranda are due—unfairly prejudices Defendants, who, on the current schedule, will not have an adequate opportunity to respond, including because the Probation Office will not have time to fairly consider such responses in preparing and finalizing the presentence reports.

WHEREFORE, we respectfully request that the Court bar the government from revising its versions of the offense conduct at this late stage.

Dated: December 23, 2022

Respectfully submitted,

/s/ David Meister

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